BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT A. LEESON Claimant	)	
VS.	)	
CENTRAL STATES THERMO-KING Respondent	)	Docket No. 1,015,360
AND	)	
UNIVERSAL UNDERWRITERS INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the December 2, 2005 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on March 7, 2005.

APPEARANCES

John E. McKay, of Kansas City, Missouri, appeared for the claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that the ALJ properly left claimant's right to medical treatment open, and that any further request for medical treatment for claimant's work-related injuries would be considered upon the filing of an appropriate application. Claimant also agreed that he was no longer pursuing any benefits for his left knee complaints.

ISSUES

The ALJ awarded claimant an 18 percent whole person functional impairment as a result of an injury to claimant's right knee as well as his back. He also awarded a 46.25

percent work disability based upon a 39.5 percent task loss and a 53 percent wage loss. The wage loss component includes an imputed wage of $400 per week as he found claimant had failed to demonstrate a good faith effort to find appropriate employment.

The respondent and its carrier (hereinafter "respondent") requests review of the nature and extent of claimant's permanent impairment. Respondent maintains that while claimant suffered a compensable injury on October 2, 2003, Dr. MacMillan testified that the nature of claimant's accident could not have led to the diagnoses and treatment claimant subsequently received, including surgery to his knee. And that even if the Board finds there is impairment to the right knee, applicable case law suggests that claimant's subsequent back complaints are not compensable. Thus, to the extent he suffered any permanency as a result of his injury, it is limited to his right knee.

Respondent also asserts that claimant was overpaid temporary total disability benefits (ttd), and that it is entitled to a credit for those sums it paid in ttd after November 5, 2004.

Claimant argues that the ALJ's Award should be modified to reflect an increase of the work disability to 75 percent. Claimant maintains he has made a good faith effort to find and retain employment, but that he is unable to work due to his injury. Accordingly, he argues the ALJ erred in imputing a wage to him. Rather, the work disability calculation should reflect a 100 percent wage loss and a 50 percent task loss. Claimant also contends he was entitled to the ttd benefits he received based upon the treating physician's records and testimony.

The issues to be resolved in this appeal are as follows:

1. Was claimant overpaid ttd benefits?; and
2. The nature and extent of claimant's impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed in all respects.

The ALJ made findings of facts relevant to this claim and the Board adopts them as its own. The Board's opinion, therefore, will only recite those facts pertinent to its decision.

Respondent argues that it overpaid claimant ttd benefits for the period November 5, 2004 to April 17, 2005. As noted by the ALJ, the records from the treating physician, Dr. William Bohn, indicate claimant was unable to work as of June 30, 2004. The balance of his records are silent as to work status. His deposition testimony suggests claimant was

incapable of working throughout the treatment period which ended April 17, 2005. The Board finds no reason to disturb the ALJ's finding that claimant was temporarily and totally disabled from engaging in substantial gainful employment until April 17, 2005. Thus, the finding is affirmed.

The remaining issue, that of the nature and extent of claimant's impairment, is a more difficult issue. It involves the question of whether claimant's direct injury to his right knee resulted in any permanent impairment and if so, does that permanency encompass the back and thereby entitle him to a whole body impairment rating and/or a work disability under K.S.A. 44-510e(a).

Claimant sustained a compensable injury on October 2, 2003 when he was struck in the right knee with some sort of hammer. Claimant initially sought treatment with his own physician, Dr. Juan Dominguez. Based upon Dr. Dominguez's records, less than a week after the accident, there were few objective findings to evidence such a blow. Although Dr. Dominguez diagnosed hemarthrosis, which is bleeding into the joint, there was no swelling, cyanosis or clubbing noted in his records. And the tests Dr. Dominguez performed during this visit revealed no damage to the meniscus.

Claimant's complaints of knee pain continued, and he was referred to Dr. William H. Gondring who diagnosed a torn medial meniscus, medial compartment degenerative disease with genu varus, a chrondral fracture of the patella and osteonecrosis. Dr. Gondring ultimately performed an arthroscopic debridement of the right knee in February 2004. Claimant testified that up to the time of his surgery, his right knee was stiff and painful. He also experienced burning, throbbing and numbness and testified that his right knee would give out daily.[1] Claimant says he told both Dr. Gondring and the physical therapist of the giving way. He further testified that up to April 18, 2004, his right knee continued to throb, swell and caused him to limp.

On April 18, 2004, approximately 2 months after surgery, claimant's right knee gave way when he was walking to his car. He alleges that this event caused his back to be injured. Since that time, he has continued to limp and experiences pain at his belt line. His right knee "catches", swells, throbs, cramps and is numb. According to claimant's regular hearing testimony, he limps nearly all the time and in fact, limped into the court room.

Since leaving respondent's employ, claimant has worked for two short periods of time for two separate employers. One job, as a courier, only lasted 4 days and earned claimant $300-400 dollars. Claimant says he quit that job because there was a delivery of paper he could not lift. He also worked for 3 weeks as a car salesman earning an

[1] R.H. Trans. at 23-24.

average of $400 per week. He quit that job because the walking, standing and getting in and out of the cars each day to start them caused him too much pain.

Claimant testified he has sent out 100-200 resumes although his written documentation of his work search reveals only 64 employers. He has, in the past, worked as an insurance salesman, but does not have a current license.

On October 3, 2005 an FCE was performed. The individual who performed this test, Janet Stone, concluded claimant failed to put forth a genuine effort during the examination and as such, the results were invalid. She made this determination based upon several inconsistencies in the test results and the fact that claimant's heart rate never exceeded 89 beats per minute, a rate that based upon his vital statistics, revealed minimal effort. She also observed claimant lifting in excess of 30 pounds with one hand while he indicated he could not lift 25 pounds when using both hands. His willingness to squat during the test was inconsistent in that at one point he refused to squat down while at another point, he did so willingly and with no difficulty. The limp that Ms. Stone initially observed came and went over the course of the examination.

Dr. Bohn, the physician who treated claimant after his April 2004 fall, and Dr. P. Brent Koprivica, the physician claimant sought out for an evaluation in connection with this claim, both testified that claimant's right knee condition, the torn meniscus, a chrondral fracture of the patella and osteonecrosis, were all due to the October 2, 2003 accident. Dr. Koprivica testified that the claimant's back injury was due to both the claimant's altered gait and his subsequent fall on April 18, 2004. Similarly, Dr. Bohn testified that he believed the back injury was attributable to the April 18, 2004 fall.

Dr. Koprivica rated claimant as having a 28 percent whole body impairment. His opinion includes a 20 percent whole body impairment for the knee and an additional 10 percent whole body impairment for the back injury. He also testified claimant had a 50 percent task loss based upon Michael Dreiling's task analysis.

In direct contrast to those opinions are those offered by Dr. Jeffrey MacMillan. Dr. MacMillan testified that claimant's present knee complaints are the result of a degenerative condition and could not have been caused by the hammer blow. In support of this position, Dr. MacMillan testified that the area where claimant's knee was struck was in an entirely different portion of the knee from where the torn meniscus was located. While the blow occurred on the inside front portion of claimant's right knee, the alleged resulting injury which necessitated treatment was in the back outside portion of claimant's knee. Moreover, the claimant's private physician's records do not reflect any bruising, swelling or fluid just one week after the accident. According to Dr. MacMillan, a blow like the one claimant describes would have resulted in at least some swelling, bruising or fluid. And although Dr. Dominguez's records reflect a diagnosis of bleeding into the joint, there were no objective signs of that condition listed in his findings. Likewise, his tests conducted on that day reflect that the meniscus was intact and was not torn.

He further takes issue with the finding of osteonecrosis, testifying that the area in which the osteonecrosis was found is not the site of the hammer blow. Thus, he believes the condition could not have been caused by this event. In fact, he testified "there isn't a snowball's chance in hell that it was."[2]

Dr. MacMillan also examined claimant's back and opined that claimant had a degenerative disc at L5-S1, but concluded these minimal abnormalities were age-related, just like the problems with the right knee. Nonetheless, Dr. MacMillan offered a rating of 2 percent impairment to the whole body for the right knee complaints and a 5 percent whole body impairment for the back complaints. He further testified that claimant sustained a 0 percent task loss based upon the task analysis offered by Terry Cordray and a 29 percent task loss based upon the task analysis prepared by Mr. Dreiling.

Dr. MacMillan noted that claimant limped the entire time he was in his office. And after the examination was over, Dr. MacMillan elected to watch claimant cross the parking lot and walk to the car. During this period of observation, Dr. MacMillan testified that claimant did not limp. Sometime after that exam and before his deposition, Dr. MacMillan was given a videotape of claimant on 3 separate days during which he is shown washing cars, walking and talking outdoors and at a car wash. At no time during this videotape does claimant appear to limp. He is seen bending down and leaning in and out of his car repeatedly, washing the car, walking around the vehicle numerous times, walking and socializing, all without any observable limp or pain.

The record contains no response from either Dr. Bohn or Dr. Koprivica regarding Dr. MacMillan's criticisms of their opinions as to the causal connection between the claimant's condition and his October 2, 2003 accident.

After reviewing the evidence, the ALJ concluded as follows:

> The preponderance of the evidence proved that the claimant's right knee problems resulted from the hammer blow. Furthermore, any subsequent injury that occurs as the direct and natural consequence of a work related injury is considered compensable as an extension of the original work injury, *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976). In this case, the claimant fell on account of the injured knee giving way, and injured his low back in that process. There was no evidence to the contrary. The preponderance of the evidence also proved that the claimant injured his low back as a direct and natural consequence of the right knee injury. It is noted that the giving way episode occurred in April, 2004, relatively close in time to the claimant's February, 2004 surgery. . .[3]

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[2] MacMillan Depo. at 20.

[3] ALJ Award (Dec. 2, 2005) at 5.

The Board has considered the ALJ's reasoning and the entire record and finds this conclusion should be affirmed.

Although claimant's credibility is significantly questioned, the Board is persuaded by the opinions of Drs. Koprivica and Bohn of the causal connection between the blow claimant sustained and the resulting knee problems. While the site of the blow might be somewhat distant from the site of the osteocronosis and the meniscus, the structure of the knee was compromised. And while there is some concern about the lack of objective findings just one week after the accident, there is no other explanation for claimant's injuries and ongoing complaints of right knee pain. The Board is persuaded that claimant's right knee complaints were attributable to his October 2, 2003 accident and that he is left with a permanent impairment.

As for the subsequent fall, the Board is likewise persuaded that it is the natural and probable result of the underlying knee injury. Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[4], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[5], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[6], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975,

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[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[5] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[6] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[7], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, the Board finds that claimant's condition did arise out of his employment with respondent and is a natural consequence of the original injury with respondent. Accordingly, the Board affirms the ALJ's finding. The Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*.

Although respondent contends *Weitharn*[8] governs this situation, a majority of the Board disagrees. As explained above, it is a long standing rule that when a primary injury is compensable, all injuries that flow from that injury are, likewise, compensable. Given the Court of Appeals recent pronouncements in *Casco*[9] and *Logsdon*[10] it would appear that this rule is alive and well. Futhermore, in this instance, claimant had surgery in February 2004 and his accident happened while he was still recuperating from that procedure. He had not been released from care. Under these circumstances, the Board believes that the fall is the natural and probable result of the original injury and is therefore compensable.

Having concluded claimant sustained a whole body injury, the Board must now determine the nature and extent of that injury. The ALJ awarded claimant an 18 percent

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[7] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[8] *Weitharn v. Safeway Stores, Inc.*, 16 Kan. App. 2d 188, 820 P.2d 719, *rev. denied* 250 Kan. 808 (1991).

[9] *Casco v. Armour Swift-Eckrich*, Docket No. 93,984, 128 P.3d 401 (Kansas Court of Appeals Decision filed Dec. 19, 2005).

[10] *Logsdon v. Boeing,* Docket No. 94,206, 128 P.3d 430 (Kansas Court of Appeals Decision filed February 17, 2006).

functional impairment which reflects a split of the ratings offered by Dr. MacMillan and Dr. Koprivca. The Board has considered this finding and affirms the same. The ALJ found no reason to discount one functional impairment over the other and as such, he averaged the two. The Board agrees with this finding.

With regard to claimant's alleged work disability, the Board likewise affirms the ALJ's findings and conclusions. Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.[11] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

The ALJ concluded claimant had a task loss of 39.5 percent, a figure that is an average of the opinions expressed by Dr. Koprivica and Dr. MacMillan using just Mr. Dreiling's list. The ALJ disregarded Mr. Cordray's task analysis as he concluded the list "takes into account what the preparer felt the tasks should be, rather than on actual

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

knowledge of what the tasks involved. . ."[12] The Board finds no reason to disturb this finding.

The ALJ concluded the claimant failed to make a good faith effort to find or retain employment after his injury and as such, he imputed a wage of $400 per week, the same wage he was actually earning as a car salesman. The Award indicates the ALJ found claimant's right knee complaints to be over-exaggerated based upon the contents of the videotape. And he further indicated that claimant's job search efforts lacked consistency and his reasons for terminating his employment with two separate employers as lacking credibility. He ultimately concluded "the evidence shows that the claimant should be capable of earning $400 per week"[13] and the Board agrees. Claimant's extensive right knee and back complaints are inconsistent with the activities reflected on the videotape. Moreover, the videotape shows claimant on 3 separate occasions. Although his counsel suggests that claimant's appearance is nothing more than a testament to his client's ability to ignore or medicate the pain, the Board is unpersuaded.

Having affirmed both the wage loss of 53 percent and the task loss of 39.5 percent, the resulting work disability of 46.25 percent is therefore affirmed.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 2, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[12] ALJ Award (Dec. 2, 2005) at 7.

[13] *Id.* at 6.

DISSENT

The undersigned respectfully dissents from the opinion of the majority in the above matter. Here, the claimant suffered an injury to his right knee on October 2, 2003 when he was struck by a hammer. After receiving treatment in the form of surgery, the claimant returned to work, and after approximately two months suffered an injury to his back when his knee allegedly gave out, and he fell. This fact scenario is almost directly on point with *Wietharn*.

In *Wietharn*, the claimant also suffered a work-related injury to his knee. After receiving treatment, the claimant returned to work, and approximately one month later suffered an injury to his back, when his knee gave out and claimant fell. While the majority attempts to distinguish *Wietharn* by arguing there was insufficient time between this claimant's surgery and the subsequent fall, that argument fails, as the timetable in the two cases are similar.

The majority cites *Stockman* and *Jackson* in support of its position. Both are analyzed by the Kansas Court of Appeals in *Wietharn*, with the court concluding:

> "The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident."[14]

The undersigned would deny claimant benefits for the back injury suffered as a result of the April 18, 2004 fall, and award only benefits for the October 2, 2003 injury to his right knee.

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BOARD MEMBER

c: John E. McKay, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[14] *Weitharn v. Safeway Stores, Inc.*, 16 Kan. App. 2d 188, 196 (1991); citing *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. at 263.